

April 7, 2011

MEMORANDUM FROM CHIEF OPERATING OFFICER

TO: Principal Officers, Assistant Administrators and Heads of Independent Offices

SUBJECT: Guidance on USAID Operations during a Lapse in Appropriations

The purpose of this memorandum is to provide an updated, integrated reference guide on USAID operations during a lapse in appropriations.

For ease of reference, this guidance is provided in the following sections. If you have any questions, please contact the appropriate Bureau/Independent Office.

- I. Determination of Excepted Functions and Positions
- II. Orderly Shutdown of Non-Excepted Functions
- III. Personnel
- IV. Travel
- V. Training
- VI. Allowances
- VII. Contracts and Grants
- VIII. Obligations and Disbursements
- IX. Time and Attendance Reporting
- X. Outside Activities
- XI. Representation Events
- XII. Furlough Questions and Answers

I. Determination of Excepted Functions and Positions

Definition of Excepted Functions: "Excepted" functions that may be continued in an absence of appropriations include those necessary to protect life and safeguard government property and records, to conduct foreign relations essential to national security, to carry out the orderly shutdown of operations, and to provide essential administrative support to excepted employees.

Employees performing "excepted" functions will continue to report to work and perform their duties, as will employees performing activities for which funds are still available. For example, functions that USAID chooses to fund with multi or no-year appropriations or through adequately funded mechanisms. Under a lapse in funding, it is possible that personnel funded through these funding sources may continue to work as long as adequate funding is available and there is adequate oversight/supervision. Similarly, Operating Expense (OE) funded administrative services contracts, which are fully funded through any potential shutdown period, may also continue.

USAID's Principal Officers at post are responsible for providing all due assistance to the Chief of Mission in developing plans for the conduct of business and the attendance of employees in the absence of an appropriation or continuing resolution. In order to facilitate this process, as well as to ensure that USAID's requirements are fully considered and incorporated, USAID Principal Officers are expected to participate fully with the Chief of Mission and representatives of other agencies in this country team task. Only those operations determined to be excepted pursuant to the above criteria would be excluded from the shutdown and permitted to operate with only the minimum staff necessary during the funding hiatus.

In case of Foreign Service National (FSN) personal service contractors and FSN Direct Hires, if host country labor laws provide that FSNs must be paid regardless of attendance (i.e., local labor law explicitly or in effect prohibits furloughing FSNs); these employees may be authorized to report to work and treated as excepted employees or they may be placed on administrative leave if mission is unable to provide adequate supervision with other excepted staff. Supervisory Americans of FSNs may not be automatically excepted on the basis of their supervisory role. Their excepted status must be independently justified based on the above mentioned criteria.

The following chart depicts USAID's estimated calculation of excepted Washington-based U.S. Direct Hires (USDHs) using the formula stated in A-11, Section 124 – Agency Operations in the Absence of Appropriations. It is expected that USAID Washington will operate at minimum levels necessary to maintain, support, and provide guidance for ongoing overseas operations. Individuals listed in item #2 are largely from the Office of Security (SEC) where they have been identified as excepted because of the direct support provided, in addition to Ronald Reagan Building (RRB) security, to overseas missions to secure USAID facilities abroad in high threat environments, intelligence analysts for vetting, counterintelligence analysts, and other overseas support operations. We have included those exempted for foreign affairs in item #2, and have

excluded from the percent calculation 88 individuals that we expect to remain on board for a short period, beyond the expected 3 hour shutdown window, for orderly shutdown activities. Once those activities are completed, they too will be immediately furloughed. If the shutdown is expected to be very short in duration, many of the individuals identified in item #4 may be furloughed immediately, if additional shutdown measures such as contract modifications are deemed unnecessary. For a longer-term shutdown, it is expected that most, if not all, of the individuals identified in item #4 will be furloughed in a matter of days. Individuals listed in item #3 (admin support) are, with only a few exceptions, expected to provide support for functions excepted in item #5 (national security) and item #1 (Presidential appointees). Individuals in item #5 (national security) will predominantly perform functions necessary to maintain, and provide technical assistance and leadership, to ongoing overseas operations.

USAID							
A-11 Calculation of Excepted Employees							
FY 2011 Potential Funding Hiatus							
Washington Based Employees Only							
Estimated 4/04/2011							
<p>The total number of USAID U.S. Direct Hire personnel expected to be on board on/about April 8, 2011, is 3,391. Of this level, 2,011 are based in Washington, while 1,380 are overseas. The following calculation is based only on the Washington USDH. The overseas calculations will be calculated once the Chiefs of Mission decisions are finalized.</p>							
# 1	#2	# 3	#3/(#1-#2)				
2,011	383	66	4.05%				
<p>#1. Number of employees expected to be on-board before implementation of the plan.</p> <p>Washington USDH only taken from NFC data provided by OHR.</p>							
<p>#2. Total number of employees to be retained under the plan because: ["otherwise exempt"]</p> <p>▶ They are engaged in military, law enforcement, or direct provision of health care activities, or</p> <p>▶ Their compensation is financed by a resource other than annual appropriations.</p> <p>From excepted spreadsheet - Total Number of employees to be excepted</p>							
<p>#3. Number of employees, <u>not otherwise exempt</u>, to be retained to protect life and property.</p> <p>From excepted spreadsheet - J2 retained to protect life and property</p>							
# of Excepted Employees by Justification Type							
J-1 Presidential Appointees =	7						
J-2 Protect life and property =	66						
J-3 Support Excepted Employee =	124						
J-4 Orderly Shutdown =	91						
J-5 National Security =	95						
Total J-1 thru J-5 =	383						

II. Orderly Shutdown of Non-Excepted Employees

All employees scheduled to work on the first workday following a lapse in appropriations should report to work. Non-excepted employees should perform only those tasks necessary to safeguard property, records, and information and to complete administrative functions such as processing payroll for pay through the last workday before a lapse in appropriations. In addition, non-excepted personnel are expected to take measures to secure files; make external contacts necessary to communicate the office's status, such as notifying parties of the cessation of normal business; and cancelling non-essential meetings, conferences, and other previously arranged business; taking necessary action to protect confidential information; and processing unpaid bills for obligations incurred prior to the last workday before a lapse in appropriations. These activities may take up to four hours for employees.

After performing the functions necessary for an orderly suspension of non-excepted operations, employees performing "non-excepted" functions will be furloughed. Managers are reminded that the Government cannot accept voluntary services; therefore, no employee may work if he or she is in a non-excepted status. Employees are advised that "work" includes reporting to work as well as accessing the Agency's network using a remote access token or blackberry, and teleworking. These employees should be advised to monitor the news for information on an additional continuing resolution and should report back to work on their next scheduled workday once another continuing resolution or an appropriation bill is enacted (passed by the House and the Senate and signed by the President), unless told to do so earlier (i.e., for rotation or other purposes).

OHR staff will scan and send electronically furlough notices and Form SF-8, Unemployment Compensation for Federal Employees Program, to Bureau/Independent Office Administrative Management Staffs (AMS) and Executive Officers. In e-mail from OHR attaching the furlough notice and Form SF-8, AMS and Executive Officers will be instructed to forward in electronic format using delivery receipt the furlough notices and Form SF-8 to individual non-excepted employees as quickly as possible on the day of the shutdown. AMS and Executive Officers will need to maintain copies of deliveries/receipt for the record.

The responsible AMS office will be instructed to send a copy of the furlough notice and Form SF-8 to non-excepted employees who are not at work. Executive Officers should advise the Chief, OHR/FSP/FSS of the names of non-excepted employees on leave or travel in the U.S. who will not return to post within two weeks of the furlough. Executive Officers should also provide a contact or-mail address for these employees, and OHR/FSP/FSS will attempt to forward the furlough notice and Form SF-8 to each employee. Executive Officers should confirm with each of these employees as they return to post that they have received notification of the furlough. If any employees are on temporary duty at other overseas posts, the Executive Officer should contact that mission for assistance in delivering the furlough notice and getting an acknowledgement of receipt, citing this guidance in support of the request.

For other non-excepted employees who cannot be notified within two weeks due to lack of a contact or e-mail address, the responsible AMS or Executive Officer should advise OHR/CSP or OHR/FSP/FSS of their names and their expected date of return to their Bureau/Independent Office or post of assignment. If possible, OHR staff will try to locate these employees.

The text of the Notice of Furlough is as follows: (EXOs copy and send as e-mail per above to FS and any GS staff not being excepted)

NOTICE TO ALL AGENCY EMPLOYEES OF SHUTDOWN AND DECISION TO FURLOUGH:

USAID appropriations expired at midnight on Friday, April 8, 2011. We have no indication yet whether Congress will act soon to pass a Continuing Resolution (CR) or appropriation, or that the President will sign it. Therefore, the only financial obligations USAID may incur are those that are necessary for the orderly suspension of Agency operations or performance of excepted activities as defined in the Office of Management and Budget memoranda for Heads of Executive Departments and Agencies dated November 17, 1981. The excepted activities are extremely restrictive and limited to “1) those necessary for emergencies involving the safety of human life or the protection of property; and 2) those necessary for activities essential to the national security, including the conduct of foreign relations essential to the national security.”

This action is being taken because of sudden emergency requiring curtailment of the agency’s activities; therefore, no advance notification is possible. The customary 30-day advance notice period and opportunity to answer are suspended under the provisions of 5 CFR 752.404 (d) (2).

Because you are not engaged in one of the excepted functions, I must regretfully inform you that you are being placed in a furlough status effective April XX, 2011. Your Administrative Officer will inform you of the exact time you are to be released today. This furlough will most likely be short-lived. We do not reasonably anticipate it to last more than a month and are in hopes that a much earlier return will be the case. Accordingly, this current furlough expires on April xx, 2011 unless funds are appropriated at an earlier date.

If other USAID employees are being retained in your office, it is because they are required for orderly suspension of Agency operations or they are performing one of the excepted activities (and/or are multi-year or prior-year funded employees, as applicable). The numbers of these individuals have been kept to a minimum and some of them may also be furloughed as activities are suspended.

During the furlough, you are in non-pay, non-duty status. Accordingly, annual, sick, home or court leave which has been approved for anytime during the furlough period is cancelled. During the furlough, you may not volunteer your services to the Agency and

must remain away from your workplace. Telework is also prohibited and you should refrain from using any of the work-related electronic devices. Supervisors will not allow employees who are not on the excepted list to be at the work site. You should contact your Administrative Officer if there are questions in this area.

Historically, the pay of furloughed employees has been restored after such a funding crisis was resolved. However, there is no guarantee that such restoration of lost pay will occur this year.

Appeal Procedures for Civil Service Employees

Employees, who have completed a probationary or trial period or one year of current continuous employment in the competitive service under other than a temporary appointment, may appeal this action to the Merit System Protection Board (MSPB). Employees in the excepted service who have veteran's preference may appeal to the MSPB if they have completed one year of current continuous service in the same or similar positions as the one they now hold. Other employees in the excepted service who do not have veterans preference and who are not serving a probationary or trial period under an initial appointment pending conversion to the competitive service, may appeal to the MSPB if they have completed two years of current continuous service in the same or similar position in other than a temporary appointment limited to two years or less. SES career appointees adversely affected may also appeal. AD and Schedule C employees do not have the right to appeal this furlough. Employees have a right to be represented by an attorney or other person of their choosing.

If you have the right of appeal to MSPB and wish to appeal this action to the MSPB, you must file the appeal within 30 calendar days of the effective date of your furlough. If you wish to file an appeal, notify the Office of the Director, Office of Human Resources (OHR) to obtain a copy of the MSPB regulations and appeal form. Following is the address of the MSPB Regional Office having jurisdiction:

Regional Director
Merit Systems Protection Board
Washington Regional Office
1800 Diagonal Rd, Suite 205
Alexandria, VA 22314-2840
<https://e-appeal.mspb.gov/>

The MSPB regulations require that you be advised that if an employee does not submit an appeal within the time set by statute, regulation, or order of a judge, the appeal will be dismissed as untimely filed, unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

If you do not have a right to appeal to the MSPB, you may be eligible to file a grievance under the Agency's Administrative Grievance procedure. An AD 400, Chapter 490, contains further information on the administrative grievance procedure.

If you are a bargaining unit employee and you are an employee in one of the categories of employees described above, you may file a grievance in accordance with the negotiated agreement procedure. You may elect either to grieve under the negotiated procedure or file an appeal to MSPB. You may not do both. If you file a grievance, you may be represented by the Union, or you may elect to represent yourself. The procedures applicable to grievances may be found in Article 31 of the Collective Bargaining Agreement between the American Federation of Government Employees (AFGE) and USAID.

If you believe that this action is based in whole or in part on discrimination, based on race, color, religion, sex, sexual preference, national origin, age, and/or physical disability, you may elect to appeal the decision in only one of the following three ways:

- a. By filing a mixed case appeal to the MSPB; or
- b. By seeking redress through the Agency's Office of Civil Rights and Diversity (OCD); or
- c. By filing a grievance through the negotiated grievance procedure (Article 31 of the Collective Bargaining Agreement). **THIS OPTION IS ONLY AVAILABLE IF YOU ARE A BARGAINING UNIT EMPLOYEE.**

Grievance Procedures for Foreign Service Employees:

You have the right to grieve this decision under the Foreign Service Grievance Procedures (ADS Chapter 486 and 3 FAM 4400). Your grievance must be submitted within two years after the effective date of the furlough. You have the right to be represented in this matter by the American Foreign Service Association (AFSA), an attorney, or other person of your choice. Your grievance should be submitted to:

Ms. Deborah Kennedy-Iraheta, DAA/HR
OHR/OD, 2.08-024, RRB
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20523

We fully recognize the difficult personal financial implications of any furlough, no matter how limited its length, and regret that this has come to pass. Please remain alert to announcements in the local media. Responsibility has been placed on individual employees to listen to public broadcasts and when you hear that a CR or an FY 2011 appropriation for USAID has been approved, you will be expected to return to work on your next regular duty day.

Thank you for your cooperation in this matter.

Deborah Kennedy-Iraheta, DAA/HR
Deciding Official
Office of the Director
Office of Human Resources

Date

The following notice will be posted PRIOR to the start of the furlough providing instructions to staff.

**NOTICE TO ALL AGENCY EMPLOYEES OF IMPENDING SHUTDOWN AND
DECISION TO FURLOUGH (For April 7 or 8 before funding expires):**

Subject: Possible Furlough beginning April 11, 2011

On Friday, April 8, 2011, the continuing resolution (CR) which is presently authorizing USAID operations will expire. By that date, if the Congress and the Administration have not agreed on the terms for authorization and appropriation of FY 2011 funding for USAID or another CR, USAID's funding may be temporarily interrupted. If this happens, it would be necessary for most of the Agency operations in Washington and many of those overseas to be suspended and all employees who have not been designated as "excepted" from furlough, or those employees performing those function for which funding is still available and which the Agency has determined should continue, will be placed in "non-duty and non-pay status".

The approved list of "excepted" personnel is available from each Bureau and Independent Office Administrative Management Services (AMS) Officers. Any changes to this list must be approved by Chief Operating Officer (COO) Sean Carroll. The approved list of overseas staff is available from the USAID Mission Director or EXO Office. Any changes to the overseas list must be approved by the Chief of Mission after coordination with the respective regional Bureau. Changes must be communicated to the respective Bureau/Office and OHR.

Instructions to staff: If USAID funding is temporarily suspended when the current CR expires at midnight on April 8th, all "non-excepted" employees will be furloughed and may take up to up to 4 hours to shutdown their activities (this should occur by no later than Monday 12 noon). Employees who wish to complete shutdown by Friday evening, the next workday (e.g. Egypt on Sunday), or by telework on Monday, may exercise one of those options. "Excepted" employees must report to work on Monday, April 11, 2011.

Those not on the excepted lists will be required to safeguard property, records and information and otherwise secure their work sites in collaboration with their supervisors. Non-excepted staff will also receive their official notice of furlough and their SF-8 from their AMS Officers via email, with receipt request, on Monday morning. Those who will not come in on Monday should be sure to receive these documents by e-mail. We anticipate these activities will take a maximum of four hours for employees. After

performing the functions above, non-excepted personnel must depart the workplace and cannot perform any further work, even on a voluntary basis, until funding is received.

As in the past, it is difficult to predict how long an interruption in funding might last. It could be for only a few days or for a longer period. Employees are encouraged to review the Questions and Answers on Furloughs at the OPM web page - <http://www.opm.gov/furlough2011/>. For further information concerning this Notice, please submit your questions to e-mail box [Shutdown info@usaid.gov](mailto:Shutdown%20info@usaid.gov) or visit the Agency's website at [shutdown information](#).

The following notice will be posted once the Agency has received instructions to begin the shutdown of operations.

NOTICE TO ALL AGENCY EMPLOYEES OF AGENCY SHUTDOWN AND FURLOUGH NOTIFICATION (For April 11, 2011)

SUBJECT: Furlough Notice

We have been advised by the Director, Office of Management and Budget, to close down operations by xxx today, due to an interruption in government funding. This closure will be carried out promptly and in an orderly manner by each USAID Bureau and Independent Office.

Prior to departure, all non-excepted personnel must consult with their AMS in order to receive their official furlough notification and Form SF-8, Unemployment Compensation for Federal Employees (UCFE) Program. Employees must acknowledge receipt by signing and dating the last page of their furlough notification.

Further developments concerning the resumption of normal operations will be announced by the news media.

POINT OF CONTACT: Questions regarding this Notice may be directed to Joann Jones, OHR/PPIM, on 712-5048 or e-mail box shutdown info@usaid.gov.

III. Personnel

American Employees

An immediate hiring freeze will apply during a lapse in appropriations.

Entry-on-board dates for prospective employees with employment offers will be suspended until the funding lapse is over. No new job offers may be made.

A review of the text of any subsequent appropriation or continuing resolution will be required to determine if Congress has authorized retroactive pay and allowances. All non-excepted personnel support activities should be suspended including unfunded security investigations.

Foreign Service Nationals (FSNs)

Under local labor law, if FSN personal services contractors or FSN direct hires are required to be paid, whether or not they work, they may work if they can be properly supervised. Supervisory American staff may not be justified as excepted employees merely because of their supervisory role; their excepted status must be independently justified. If supervisors are determined to be non-excepted and FSN staff cannot operate without such supervision, FSNs must be placed on administrative leave. During any lapse of appropriations, missions should obligate benefits and allowances for those FSNs who are required to work. However, any such obligations will be liquidated only after USAID receives a new appropriation covering their activities.

Part-Time Employees

In defining the number of furlough days for part-time employees, the furlough days are computed in the same proportion to those days scheduled for fulltime employees, based on work schedules. (The hours might be computed as a percentage of the work schedule for full-time employees.)

Intermittent and When Actually Employed (WAE) Employees

Intermittent and WAE employees are non-fulltime employees without a regularly scheduled tour of duty and called to duty, as needed. Intermittent and WAE employees who are not non-excepted will also be furloughed. If an intermittent or WAE employee is called into work during a furlough, it must be to perform excepted functions.

Employees on Alternative Work Schedules (AWS)

Employees under AWS would be furloughed for the number of hours they were scheduled to work on the days for which there was a lapse in appropriations.

Rotation of Personnel

Managers may rotate personnel to perform excepted functions. However, the following factors should be considered when making a decision on staff rotations:

- Managers should take into account the impact the rotation schedule may have on unemployment compensation eligibility for the employee, based on local jurisdictions' unemployment insurance policies.
- Decisions on rotations for specific positions should balance the Agency's need for continuity and equity to the employees.
- Managers should determine on what basis rotations will occur (i.e., daily or for longer periods), but due consideration should be given to continuity and fairness.
- Personnel rotated into and out of an excepted function must have the requisite qualifications to perform the function.

Management decisions to rotate personnel into and out of an excepted function must be documented in writing.

IV. Travel

Travel should be limited to that necessary for emergencies involving the safety of human life or the protection of property, or that necessary for the conduct of foreign affairs essential to national security. This may include, but is not limited to, attending significant bilateral or multilateral meetings; maintaining excepted post operations; disaster relief efforts, emergency visitation, medical, other ordered evacuation, or providing food, medicine, or other essential services to displaced persons. All travel authorizations must be approved by the Bureau or Independent Office Head or the Mission Director.

Reassignment of personnel already planned may be continued, such as changes in posts of assignments, only if funds have been previously obligated.

Personnel in domestic or overseas travel status who are performing excepted functions may continue to do so. If personnel are in travel status at the time of the lapse but are not performing excepted activities, they should stop work and await further instructions. Because funding for overseas travel is obligated when the travel commences or when any cost was incurred for the travel (i.e., prior to the lapse) and because it is expected that any hiatus in funding will be temporary, personnel in non-excepted travel status should be instructed not to return immediately to their home duty stations. If such persons are not performing an excepted activity, they should be furloughed. Per Diem will be payable on furlough days when in authorized travel status. However, salary will not be paid.

Employees in training and on authorized travel orders should make arrangements to return to their regular work site as soon as informed by the Foreign Service Institute or other training entity. On a limited basis, some training may continue if it otherwise pertains to the safety and security of personnel.

V. Training

In accordance with the Department of State's Guidance on Operations during a Lapse in Appropriations, the Foreign Service Institute (FSI), and other domestic facilities will be closed, except those portions of the Diplomatic Security Training Center and FSI's National Foreign Affairs Training Center campus housing employees performing excepted functions.

On a limited basis, training may continue if it otherwise pertains to the safety and security of personnel. The Department of State has indicated that the following training may remain open:

- Crisis Management Training and Antiterrorism Assistance Training that has already started at overseas posts may continue if posts are open, subject to the approval of the Chief of Mission since this pertains to the safety and security of personnel.
- Domestically, the following courses will continue as scheduled since they pertain to the safety and security of personnel going to Afghanistan, Iraq and other posts of heightened danger: the Afghanistan PRT Orientation (AR421); Afghanistan Familiarization (RS4IS); Iraq Familiarization (PT6I0); Iraq PRT Orientation (AR 420) and the Interagency Integrated Civilian-Military Training Exercise for Afghanistan (RSSI 0); the Diplomatic Security Training Security/Non-Traditional Operation Environments course (SNOE OT401) and for those deploying to posts where it is mandatory, the Foreign Affairs Counter Threat Course (OT61 0).

All other class attendance, domestically and overseas, will be suspended. Those employees in training who are otherwise designated as necessary to perform "excepted functions" should return to their positions and regular duty status. Those employees not so designated will be furloughed.

VI. Allowances and Differentials under the Standardized Regulations

USAID adheres to Department of State Standardized Regulations (DSSR) pertaining to allowances and differentials. Section 030 of the DSSR states that: “Any provision in these regulations that limits the payment of allowances to an employee because the employee is in a non-pay status shall not apply to any employee who is in a non-pay status solely due to a lapse of appropriations.”

Accordingly, employees assigned to overseas positions or on TDY, allowances and per diem will continue to accrue, except for representational expenses. The Mission Director may authorize the use of representational expenses on an exceptional basis when necessary to support excepted activities essential to national security, including the conduct of foreign affairs.

VII. Grants and Contracts

As the Government Accountability Office has long recognized, funding gaps due to lapses in appropriations raise particularly thorny issues in the area of contractual commitments, where generally applicable Anti-Deficiency Act requirements may be in apparent conflict with orderly shutdown activities and with continuation of excepted functions. The following guidance is directed toward providing a framework for consistent treatment of contract and grant commitments by Agency Operating Units that is consistent with the overall Agency shutdown plan and that will minimize ultimate costs and disruptions.

Existing Contracts

Previously awarded contracts (including leases) that continue in performance during a lapse in appropriations and have adequate funding previously obligated to permit continued performance during a shutdown period should generally be permitted to continue unless the Operating Unit cannot provide “adequate oversight of contract performance” during a shutdown period or there is no need for the supplies or services during this period. If adequate monitoring of contractor performance cannot be provided, suspension or reduction in performance of non-excepted services should be considered if authorized by the terms of the contract. Care should be taken not to incur unnecessary costs or jeopardize the Government's future contractual rights by unilateral stop work orders or directions to reduce the scope of work that are not authorized by the terms of the contract or that will cause the contractor to incur costs that could subsequently be charged to the government. If circumstances require further guidance, consult GC or the RLA.

Previously awarded contracts and leases that would, in the absence of funding, require renewal or modification during a lapse in appropriations to obligate additional funds for continued performance may be authorized to continue only if necessary to support excepted activities authorized for continuance under the Agency's shutdown plan or if genuinely needed to protect Government property or human safety. Before the Contracting Officer may obligate additional funds under this circumstance, the Bureau Budget Office or Mission Controller (overseas) must certify that funds are available within the annual financial plan targets. Incurring unfunded obligations for such services during a funding gap does not violate the Anti-Deficiency Act, but payment of such unfunded obligations must be deferred until appropriations are provided by the Congress. See Section VIII - Obligations and Disbursements for additional certification requirements and further guidance on funding excepted contracts.

The chart found at Attachment 1 outlines the general process for determining whether to continue performance of an existing contract.

New Contracts

New contractual commitments (including leases) during a lapse in appropriations may be made only if necessary to support excepted activities authorized for continuance under the Agency's shutdown plan or if genuinely needed to protect Government property or human safety. The same principle applies to exercising options. Before making a final decision to not exercise an option that could expose the Government to delays or disruptions, the contracting officer should consult with GC. Before the Contracting Officer may obligate additional funds under this circumstance, the Bureau Budget Office or Mission Controller (overseas) must certify that funds are available within the annual financial plan targets. Unfunded contractual commitments should be kept to the minimum in cost and duration that will meet the essential need. See Section VIII Obligations and Disbursements for additional certification requirements and further guidance on funding excepted contracts.

Existing Grants and Cooperative Agreements

Recipients may continue their activities under an existing award if they have adequate funding previously obligated. In order to incrementally fund an existing award, the following issues should be considered:

- Does the award support activities that authorized under the Agency's shutdown plan, genuinely needed to protect Government property or human safety, or critical to the conduct of foreign affairs?
- Does funding exist under an available appropriation to continue the activity?
- Does the operating unit have adequate staffing to administer the activities during the shutdown?

Before the Agreement Officer may obligate funds under this circumstance, the Bureau Budget Office or Mission Controller (overseas) must certify that funds are available within the annual financial plan targets. See section VIII Obligations and Disbursements for additional certification requirements and for further guidance on obligations and disbursements.

Under assistance awards, the Government generally cannot terminate for convenience but is not obligated to provide funding beyond the current obligation in the award. Should the Operating Unit decide not to continue funding, the Agreement Officer should notify the recipient that no additional funds will be provided at this time.

New Grants and Cooperative Agreements

You should not enter into any new grants or cooperative agreements during the period of a lapse in appropriations, unless award of the grant or cooperative agreement is necessary to support emergency activities or is critical to the conduct of foreign affairs. Before the Agreement Officer may obligate funds under this circumstance, the Bureau Budget Office or Mission Controller (overseas) must certify that funds are available within the annual financial plan targets. See section VIII Obligations and Disbursements for additional certification requirements and for further guidance on obligations and disbursements.

Personal Services Contracts

Personal Services Contractors (PSCs) performing "excepted" functions will continue to report to work, as will PSCs performing activities for which funds have already been obligated and are still available. Positions that the Agency funds with multi-year or no-year appropriations (with remaining available balances), trust funds, and other permanent appropriations will continue as long as there is funding available and work to be performed. OE-funded PSCs may continue to work as long as sufficient funds are obligated to their contracts. If funds for these activities later become exhausted, then the applicable shutdown plan will become operative and only excepted functions will be continued.

Furloughs of PSCs are accomplished through a partial termination for the convenience of the Government. A termination for convenience requires a minimum notice of 15 calendar days before it is effective. Contracting Officers must notify PSCs of the partial termination of their contracts 15 days before funding will be exhausted under their award.

If local labor laws prohibit placing a local hire PSC who would otherwise be furloughed in an unpaid non-work status, the PSC will be placed on administrative leave and notified that they will be paid as soon as funds become available.

VIII. Obligations and Disbursements

Obligations

During any lapse of appropriations, obligations may continue to be incurred for excepted activities. Bureaus, offices and missions must operate under strict constraints that ensure USAID is in compliance with OMB and GAO guidelines. Specific guidance is as follows:

During a lapse in appropriations, USAID has legal authority to incur obligations to continue excepted activities. However, the incurred obligations should not be formally recorded (posted) in GLAAS and/or Phoenix as there are no appropriations against which to record the obligations.

Per OMB guidance, payments cannot be disbursed against lapsed appropriations for obligations incurred after the lapse begins. Disbursements may be made for obligations incurred before the lapse period (in this case, on or before April 8, 2011), however payment operations are not deemed essential to meet payment terms.

All obligations and obligating documents issued during the lapse period must be approved by the Mission Director, Assistant Administrator or Independent Office Director for each respective operating unit and the following statement shall be affixed and signed by the Mission Director, Assistant Administrator or Independent Office Director, as applicable: "This obligation is necessary to carry out excepted activities in the absence of an appropriation or to perform activities for which funds are otherwise available."

Bureaus, offices and missions should maintain detailed records of all obligations incurred that cannot be recorded during the lapse period. As soon as obligation authority is obtained, all obligations should be recorded immediately.

Disbursements

Authorized certifying officers may certify vouchers and authorize payments against valid obligations established against available prior year annual, no-year or multi-year appropriations, and for FY 2011 obligations established only through the end of the current Continuing Resolution (i.e. April 8, 2011).

Upon determination that a lapse in appropriation is imminent and furloughs may be executed, the Chief Financial Officer (CFO) will exercise a waiver of the Prompt Payment Act to advance all approved and certified vouchers for payment. Even though activities funded with a prior year annual, no-year or multi-year appropriation may continue during a furlough, OE-funded personnel required to process related payments are generally not considered excepted personnel unless the payments function is essential for the activity to continue. Certifying officers may not certify and authorize payments against USAID obligations incurred after April 8, 2011 unless specifically approved by the CFO, in consultation with the Office of General Counsel to determine if payments are necessary as "excepted" functions. While obligations or disbursements may be incurred for excepted activities, neither type of transaction may be posted (formally recorded) in USAID's financial systems.

Specific Situations

The following are typical bureau/mission obligation/payment categories and how they should be handled:

1. LE Staff and FSN pay/allowances: Standard procedures to process LE Staff payroll must be followed . Under no circumstances should alternate means be used to pay LE Staff and FSPSC salaries, such as using petty cash. As per the above general guidance for obligations after April 8, 2011, no obligations for payroll after that date should be recorded as official accounting transactions, even for excepted activities. More detailed guidance on submitting time and attendance during the period of the lapse will be provided prior to the deadline for the next submission of time and attendance.

2. American Salaries, Benefits, and Allowances: While obligations can continue to be established for payrolls for persons performing "excepted" and shutdown activities, payments for salaries and allowances may only be made for services rendered through April 8, 2011. Payroll activities for salaries earned prior to lapse of appropriation are deemed "excepted" and therefore, payroll personnel will fully support payment of earned salaries prior to appropriation lapse.

3. Travel: Only travel in fulfillment of excepted activities can be initiated after a lapse of appropriations. Per guidance above, even in cases of travel in this category, obligations made after any lapse of appropriations should not be recorded in USAID accounting systems even though obligations may have been incurred. Blanket travel orders issued prior to April 8, 2011 are not valid during the lapse period, unless in the case of overseas travel, travel commenced prior to the shutdown. No travel advances may be issued unless the obligation for overseas travel was incurred prior to April 8, 2011. Travel voucher reimbursements can be processed against obligations incurred and recorded for prior years, or for FY 2011 (if obligated prior to April 8, 2011) multi-year or no-year appropriations for which funds remain available, however, such processing shall not be an "excepted" activity. Travelers who hold Citibank Travel Cards may charge advances against these cards for any approved trips as travel card advance charges do not create advances to official accounts. As part of GSA Smart Pay cards, Citibank Travel Cards will continue to function normally and banks will continue to provide service. Cardholders, as usual, should contact the bank customer service organization should they experience problems with their cards.

4. Utilities: As with other categories of payments, utility payments for obligations established prior to April 8, 2011 may be processed for payment. Obligations for utility costs after April 8, 2011 should not be recorded in USAID accounting systems even

though incurred and utility payments for periods after April 8, 2011 cannot be made from lapsed appropriations. Missions confronted with any emergencies in this regard should contact CFO as soon as possible.

5. Representation: Representation events are not authorized after a lapse of appropriations.

6. Purchase Orders: Generally, purchase order obligations and payments are to be governed by the above guidance. Obligations for purchase orders prior to April 8, 2011 should have been recorded.

7. Petty Cash Payments: Similar guidance applies to all categories of miscellaneous petty cash payments. A voucher can be paid if the obligation supporting it was incurred prior to April 8, 2011. For example, a petty cash reimbursement for taxi fares incurred prior to April 8, 2011 can be paid. No petty cash reimbursement can be made for taxi fares or other purposes incurred after April 8, 2011 unless against an available multi-year or a no-year appropriation. The absence of appropriations does not affect accommodation exchange.

8. Collections: Embassy cashiers can continue to process all collections as usual.

9. Certifying Officer Responsibility: Post financial management and certifying officers have the responsibility to ensure that only authorized obligations are recorded, and only payments against authorized obligations are certified for payment and forwarded for disbursement. Edits in our overseas financial systems should ensure that payments are not processed unless a valid obligation has been recorded. Posts should not de-obligate funds previously obligated prior to April 8, 2011 and re-obligate to new obligations after April 8, 2011.

10. Absolutely Necessary Payments: To reiterate, and consistent with OMB guidance, we have authority to incur some types of obligations during the lapse period. If such obligations require special payment handling during the lapse period, a special request and justification should be coordinated with the CFO.

11. Emergency Medical Services: If the concurrence of Department of State Office of Medical Services (MED) is received, emergency medical travel and services obligations can be incurred but not recorded. Accordingly, payments may be made in consultation with the CFO. Please coordinate with MED and follow guidance in paragraph 12 in emergency situations where payment is required immediately. For medical services funding requests the post should cable MED and coordinate with the CFO.

IX. Time and Attendance Reporting

Reporting Hours during the Furlough Period

During the lapse in appropriations, employees must be either (1) at work performing excepted activities, or (2) furloughed. They, therefore, cannot be in a paid leave status (i.e., annual leave, sick leave, other paid leave, or using earned compensatory time off) during that period.

Normal hours worked during the furlough period by excepted employees are reported in USAID's electronic time and attendance system known as webTA as regular duty hours. Absences resulting from the furlough of non-excepted employees are reported in webTA as "Furlough." The transaction code for "Furlough" is found under the dropdown menu under Annual Leave. FSNs are processed in a separate payroll system but the same reporting requirements and questions and answers below apply.

Questions and Answers Regarding Time and Attendance

The following questions and answers on reporting time and attendance during a lapse in appropriations are based on guidance from the U.S. Office of Personnel Management (OPM).

Q. How should hours worked by excepted employees during the furlough be reported?

A. Hours worked by excepted employees should be reported in webTA as regular duty hours. If an excepted employee is unable to work during the furlough period, he or she must be placed in a furlough status until such time as the employee reports for work.

Q. How should furlough time for non-excepted employees be reported?

A. Absences resulting from the furlough of non-excepted employees should be reported in webTA as "Furlough." This transaction code is found under the dropdown menu under "Annual Leave."

Q. Can annual leave, sick leave, or earned compensatory time off be charged during a furlough?

A. No. Furloughs place employees in a non-pay, non-duty status. Employee may not be carried in a paid leave status during the furlough period.

Q. If an employee was on approved leave without pay (LWOP) during the furlough, would LWOP continue?

A. Yes. LWOP will continue and should be reported as LWOP for time and attendance purposes.

Q. How do you record the time for an employee who had previously scheduled sick or annual leave that fell within the furlough period?

A. Employees may not be in a paid leave status during the furlough period. Consequently, all sick and annual leave must be cancelled and is not reported. If an excepted employee is unavailable for work and performing his or her duties, then he or she should be furloughed and the hours for which he or she did not work would be reported in webTA as furlough.

X. Outside Activities

Public Affairs Activities

As a general rule, all public affairs and community relations activities such as speeches to the public and participation in university seminars and media events should be cancelled and no invitations for participation in these activities should be accepted during the shutdown period. Any exceptions require the explicit approval of the Bureau for Legislative and Public Affairs (LPA).

LPA staff may need to communicate with the media regarding events and issues related to excepted activities; i.e., those which involve the safety of human life or the protection of property, or those necessarily related to national security, including the conduct of foreign affairs.

Outside Employment

Even while on furlough, an individual is an employee of the Federal Government. Therefore, the Executive Branch-wide standards of ethical conduct at 5 CFR Part 2635, which includes rules on outside employment, continues to apply to employees on furloughs. Additionally, there are statutes which prohibit certain outside activities. Employees must consult with and obtain approval from the Office of the General Counsel, Ethics and Administration (GC/EA), before engaging in outside employment.

XI. Representation Events

As a general rule, no representation events should be held during the shutdown period. Events already scheduled should be cancelled and no new events planned until the shutdown is over. In exceptional cases, Mission Directors in coordination with the Chief of Mission may authorize a representational event overseas only if it is necessary to support excepted activities. Mission Directors should consider the perception of a representational event during an Agency shutdown.

XIII. Furlough Questions and Answers

For questions related to direct hire employees please visit the Office of Personnel Management's website at: <http://www.opm.gov/furlough2011/>

A. Excepted activities under the Anti-deficiency Act (express statutory authorizations, emergency circumstances, and the President's constitutional authorities).

As DOJ has explained in its opinions, an agency may incur an obligation in the absence of an appropriation in certain "excepted" situations:

1. A statute or other legal requirement expressly authorizes an agency to obligate funds in advance of appropriations.

In very rare situations, Congress has granted an agency the statutory authority to incur obligations in advance of appropriations. The best known example, in the contracting realm, is the Civil War-era Feed and Forage Act (41 U.S.C. § 6301), which provides authority to the Defense Department to contract for necessary clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies in advance of appropriations. Other examples are the authorities provided by 25 U.S.C. § 99 (Bureau of Indian Affairs contracts for goods and supplies) and 41 U.S.C. § 6302 (Army contracts for fuel).

2. The function addresses emergency circumstances, such that the suspension of the function would imminently threaten the safety of human life or the protection of property.

As DOJ has explained, the emergency exception applies when both of the following exist:

(a) a reasonable and articulable connection between the obligation (in this case, involving a contract or grant) and the safety of life or the protection of property, and (b) some reasonable likelihood that either the safety of life or the protection of property would be compromised in some significant degree by failure to carry out the function in question -- and that the threat to life or property can be reasonably said to be near at hand and demanding of immediate response.

As the Anti-deficiency Act states, the emergency exception does not authorize the continuation of ongoing, regular functions of government, the suspension of which would not imminently threaten the safety of human life or the protection of property.

3. The function is necessary to the discharge of the President's constitutional duties and powers (e.g., Commander-in-Chief or 3 conducting foreign relations).

B. Activities that an agency must continue, in the absence of appropriations, because their continuation is “necessarily implied” from the authorized continuation of other activities.

In addition, as DOJ has explained, there are a limited number of government activities which an agency must otherwise continue despite a lapse in their appropriations because the lawful continuation of other funded or excepted activities “necessarily implies” that these additional activities will continue as well. A “necessary implication” can arise when an agency needs to incur obligations, even though there has been a lapse in the appropriation against which those obligations would be charged, in order to implement:

1. An “orderly shutdown” when there has been a lapse in appropriations (as the Justice Department has explained, “authority may be inferred from the Anti-deficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies”),

2. One of the “excepted” activities in I.A. above, or

3. A congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse (including funds already obligated from the current fiscal year), where the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of the statutory authorization or appropriation. The touchstone of the analysis is determining whether execution of the terms of the statutory provision – not the terms of the funded contract or grant pursuant to that statute – would be significantly damaged in the absence of immediate performance of the unfunded, related activity.

As DOJ has explained, an example of a “necessarily implied” activity, for which obligations can continue to be incurred despite a funding lapse, are the administrative activities (funded out of annual appropriation) that are necessary to disburse benefit payments under entitlement programs, such as social security benefits, for which an indefinite appropriation provides the funding for the benefits (and for which there is a congressional authorization to make regular payments to beneficiaries).

However, as DOJ has also explained, a “necessary implication” may not ordinarily be inferred from the kind of broad, categorical authority that often appears in the organic statutes of government agencies.

Moreover, the fact that an agency has unobligated balances (appropriated in a prior fiscal year on a multi-year or no-year basis) that continue to remain available for funding a program does not, in itself, demonstrate that the incurring of obligations for related activities (for which there has been a lapse in appropriations) is necessarily implied. In

this regard, it is often the case that agencies possess discretion with respect to when, during the period of availability, the agency engages in activities for which Congress has provided funding. Furthermore, in those cases when Congress has provided funding on a multi-year or no-year basis, the agency may often possess substantial discretion with respect to the timing of when the agency carries out these funded activities. In such situations, where an agency is not otherwise compelled by the terms of a statute to engage in a funded activity during a period in which there is a lapse in appropriations, there is not a “necessary implication” that the agency must incur obligations for related activities for which the appropriation has lapsed.

II. Questions and Answers on Contracts and Grants.

The following Q&As address principally the impact on contract and grant activity of a lapse of appropriations, with respect to an agency incurring obligations for the contract or grant itself as well as for the administrative activities in support thereof.

Of course, in the situation in which performance under an already-issued contract or grant is not impacted by such a lapse, the contractor or grantee may continue to proceed with its work during the lapse period. An example is the situation where an agency has already obligated funds representing the entire price under a contract or task order before the funding lapse began, or where the agency may use multi-year or no-year funds to incur new obligations for the contract or grant. This assumes there is no problem with funding for any necessary related activities, for example, by federal employees overseeing the contract or grant. The question of what to do if necessary activities related to the contract or grant are funded out of lapsed appropriations is addressed in Question 5 below.

A. Incurring New Obligations for Contracts or Grants.

Q1. When an appropriation has lapsed, may an agency incur a new obligation – by signing a new contract or grant, or by extending a contract or a grant, or by exercising a renewal option – when the funding source for that obligation would be the lapsed appropriation?

A1: No – except in very limited circumstances.

The Anti-deficiency Act prohibits agencies from incurring obligations that are in advance of, or that exceed, an appropriation. Thus, except in certain limited circumstances, an agency may not incur obligations when the funding source for the obligation would be an appropriation that has lapsed. As outlined above in I.A.-B., these limited circumstances are when:

1. A statute expressly authorizes an agency to obligate funds in advance of appropriations.
2. The function addresses emergency circumstances, such that the suspension of the function would imminently threaten the safety of human life or the protection of property.

3. The function is necessary to the discharge of the President's constitutional duties and powers.
4. The agency must continue the function, in the absence of appropriations, because its continuation is "necessarily implied" from the continuation of other authorized activities.

In these limited circumstances, an agency may incur the obligation (e.g., by awarding a contract to support an emergency activity, such as the minimal necessary guard services to protect a facility), but the agency cannot pay the contractor until appropriations are enacted. Agency staff should work with agency counsel to establish if such an exception may be appropriately invoked.

Q2. May an agency incur a new contractual or grant obligation in order to address emergency circumstances, even though the annual appropriation, against which the obligation would be charged, has lapsed?

A2: Yes, if the new obligation is necessary to address emergency circumstances that imminently threaten the safety of human life or the protection of property. See I.A.2., above, and the DOJ opinions that address the emergency exception.

Q3. May an agency incur a new contractual or grant obligation – even though the appropriation for this obligation has lapsed – as part of the agency carrying out a program that is separately funded through an appropriation that remains available?

A3: That depends on whether the authority to incur the obligation during the lapse is a "necessary implication" of the program (see I.B. above).

Q4: May an agency incur a new contractual or grant obligation that would be charged against an appropriation that remains available for obligation if the agency would not incur any related obligations (such as for administrative activities by agency employees) for which the appropriation has lapsed?

A4: Yes. In this situation, the agency may incur the new contractual or grant obligation, since both the contract or grant obligation itself, as well as the obligations for necessary related activities (e.g., the administrative actions that are needed in order for the agency to incur the contract or grant obligation), may be charged against an available appropriation.

B. Continued Performance of Administrative, Supervisory, or Support Activities, During a Funding Lapse, In Connection With a Previously-Awarded Contract or Grant.

Q5: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. If there has been a lapse in the appropriation that funds the Federal employees who supervise or support the performance of the

contract or grant, can the Federal employees continue these activities during the funding lapse?

A5: In most cases, the absence of appropriations would prevent the continuation of such supervision or support. Routine ongoing activities, related to the agency's contract and grant administration, would not usually be authorized to continue when there has been a lapse in the appropriation that funds the contract and grant administration activities. In other words, during a funding lapse, the performance – by contracting officers, contracting officer technical representatives, contract administration personnel, and grants management specialists – of routine oversight, inspection, accounting, administration, payment processing, and other contracting or grant management activity would generally not continue.

There are very limited circumstances under which such work may continue, notwithstanding the lapse in appropriations. As is further explained in I.B. above, these limited circumstances are when the continued performance of the contract or grants administration is “necessarily implied” for carrying out:

1. An “orderly shutdown” when there has been a lapse in appropriations,
2. One of the “excepted” activities in I.A. above (i.e., express statutory authorizations, emergency circumstances, and the President's constitutional authorities), or
3. A congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse, where the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of the statutory authorization or appropriation.

For example, in the situation where an agency has awarded a contract to provide services that are necessary to address emergency circumstances that pose an imminent threat to life or property, some contract administration might well be necessary in order to enable this “excepted” activity to accomplish its objective (e.g., where a contractor cannot perform an emergency service unless the contractor receives direction from the contracting officer regarding how and where to proceed). In that situation, that direction by the contracting officer would be a “necessarily implied” activity, and thus could occur even though there has been a lapse in the appropriation that funds contract administration.

Another example might be a grant program that cannot proceed to the next milestone, under the previously-awarded grant, unless the grant administrator provides approval to the grantee for its continued performance. If the grant program is one that is mandated by Congress, and if failing to proceed to that next milestone – during the period of the funding lapse – would violate a statutory timetable, then in that case the review and approval by the grant administrator would be a “necessarily implied” activity, and thus could occur even though there has been a lapse in the appropriation that funds grant administration. Again, the touchstone of the analysis is determining whether execution of the terms of the statutory authorization or appropriation for which funding remains

available – not the terms of the funded contract or grant pursuant to that statute – would be significantly damaged in the absence of performance of the unfunded activity.

These situations are expected to be very limited ones, and the employee may be excepted from furlough only for the bare minimum of time necessary to carry out the review and approval.

Q6: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. In addition, the agency has determined that, due to a lapse in the appropriation that funds the Federal employees who supervise or support the performance of the contract or grant, those Federal employees cannot continue these activities during the funding lapse. In the absence of such supervision or support, may the contractor or grantee nevertheless continue performance?

A6: If the continued supervision or support, during the lapse period, is not critical to the contractor's or grantee's continued performance during that period, then the contractor or grantee may continue to proceed with its work. This is the case, for example, if an agency had obligated funds representing the entire price for a good or service under a contract or task order before the funding lapse began. In that example, the agency would not have to issue an affirmative direction to the contractor or grantee to continue performance, such as a notice to proceed. Instead, the contractor or grantee could continue to engage in performance. (It is always prudent to be in communication with the contractor or grantee to avoid a misunderstanding.)

However, depending on the duration of a funding lapse, the absence of available Federal employee oversight may lead an agency to reconsider whether the contract or grant activity should continue to be performed. In particular, if the continued supervision or support, during the lapse period, is critical to the contractor's or grantee's continued performance during that period, then – where consistent with law and the terms of the contract or grant – the agency should instruct the contractor or grantee to suspend performance.

The same would be true if continued performance depends on the participation of other Federal agencies or the availability of other Federal facilities that would be precluded by the lapse of appropriations.

Q7: The agency has previously awarded a contract or grant, and the contractor or grantee is in the midst of performance. In addition, the agency has determined that the continued performance of the contract or grant, during a lapse in appropriations, does not require the supervision or support of Federal employees who may not continue to perform these activities during the funding lapse. In that case, should performance of the contract or grant always continue during the funding lapse?

A7: The first consideration is whether continued performance of the contract or grant is required in order for the agency to comply with its authorization or appropriations statute. If it is the case that continued performance is statutorily required, then performance should proceed.

If continued performance is not statutorily required, then the agency should consider whether having the contract move forward is a sensible use of taxpayer funds in light of the lapse of appropriations. In this regard, there might be situations in which the continued performance of a contract would be wasteful due to the impact that the funding lapse is having on other agency activities. For example, if a Federal building is closed due to the funding lapse, it might be wasteful to have a contractor perform its normal duties of emptying trash cans every day in the building's offices. In that situation, the agency should consider whether to have the contractor suspend performance.

If an agency decides that continued performance would be wasteful and thus should be suspended during the funding lapse, the agency should take appropriate contractual action (which would be part of the agency's orderly-shutdown activities). Contracting staff will need to work closely with agency counsel in making and implementing these decisions to minimize costs to the government.

Q8: Is the duration of a funding lapse a factor in the analysis in Q&As 5-7?

A8: Yes. In evaluating whether, and to what extent, Federal employee activities – and contractor or grant performance – should continue during a lapse in appropriations, agencies should consider whether these activities or the performance can be postponed until after appropriations are enacted.

In some cases, activities and performance would not qualify for continuation during a very brief funding lapse (under the analysis in Q&As 5-7), but they would qualify if the duration of the funding lapse became longer.

In other cases, the opposite conclusion should be reached, namely, that activities or performance which would qualify for continuation at the outset of a funding lapse, or at some point during a funding lapse, become unnecessary – having been discharged – and thus should be discontinued (e.g. in the case of an agency's initial shutdown activities, or in the case of the one-time, grant-administrator approval that is discussed in the answer to Question 5).

Another situation in which the duration of a funding lapse can have a significant impact on the analysis is where the agency had previously awarded a contract or grant, and – under the analysis in Q&As 5-7 – the contractor or grantee could continue to perform during the initial period of the funding lapse. However, if the funding lapse extended for a sufficiently long period, a situation might arise in which continued performance could occur only if the agency obligated additional funds to the contract or grant. Whether the agency could obligate such additional funds would depend on whether the lapse of appropriations includes the funding for the contract or grant payments, and/or for the

contract or grants administration, and whether the continued performance would be wasteful because of the impact of the funding lapse on other agency activities. The agency would therefore need to undertake the analysis under Q&As 2-8 to determine how to proceed in that situation. If the agency determines that the contract or grant performance should discontinue due to the funding lapse, then the agency would not obligate additional funds to the contract or grant, and the contractor or grant would cease work when the previously-obligated funds run out. (Agencies would be well advised to communicate with contractors to avoid any misunderstanding.)

C. Making Payments to Contractors and Grantees during a Lapse in Appropriations

Q9: In the case of a contract or grant that has been previously awarded (and thus for which available funds were obligated), can Federal employees be excepted from furlough in order to make timely payments to the contractor or grantee in accordance with the contract or grant?

A9: No – except in very limited circumstances.

During a lapse in appropriations, the activity of making contract and grant payments on a timely basis does not, by itself, qualify as one of the limited circumstances for which obligations can be incurred under the Anti-deficiency Act (as outlined in I.A.-B., above). In this regard, the fact that the government would incur interest penalties under the Prompt Payment Act or other law, due to the delay in payment caused by a funding lapse, does not provide a legal justification under the Anti-deficiency Act for an agency to continue to make payments during a funding lapse.

An exception would exist in the very limited situation in which making the payment to a contractor or grant – during the funding lapse – is “necessarily implied” under the analysis outlined in I.B., above. There may be very limited circumstances where making a payment, during the funding lapse, is necessary because the agency’s failure to make the payment – during the funding lapse – itself would result in an imminent threat to life or property, or would critically impair the President’s constitutional functions, or would prevent or significantly damage the execution of a congressionally authorized and funded function. In that latter situation (applying the analysis in I.B.3., above), the agency must determine that (1) the continuation of the program during the funding lapse has been contemplated by Congress in authorizing or appropriations legislation, (2) the agency’s failure to make the payment during the funding lapse would delay contract or grant performance, and (3) this delay in payment would significantly damage the execution of the terms of the authorizing or appropriations legislative provision.

Q10: Can an agency pay a contractor or grantee, during a funding lapse, for performance under a contract or grant that the agency awarded during the funding lapse under one of the exceptions to the Anti-deficiency Act (see Q&As 1-2)?

A10: No. As is the case with federal employees who are excepted from furlough to perform authorized activities during a funding lapse, the agency will incur obligations for the excepted work that a contractor or grantee is authorized to perform during a funding lapse. However, as with the pay of the excepted federal employees, the agency cannot liquidate those contract and grant obligations until an appropriation is enacted.

D. Can Non-furloughed Employees Perform Other Work?

Q11: The agency has excepted, from furlough, employees who are performing necessary contract or grant support functions for an “excepted” activity or under the “necessarily implied” standard. Can these employees also continue to perform other work (that is not for an excepted activity and is not “necessarily implied”) during the remaining hours of the workday?

A11: If the non-furlough (“excepted”) support function can be performed in less than an entire day, the employee is required to resume furlough status after completing the function.

However, there may be cases in which an employee is required to perform this “excepted” support function intermittently throughout the course of the day, and the intervals in between are too short to enable the employee to be furloughed and then recalled in time to perform the function. In such cases, the employee may remain at work, and may perform non-“excepted” functions during these intervals. In such situations, agencies must minimize the number of employees who are performing “excepted” functions on an intermittent basis, by consolidating the “excepted” functions, to the extent possible, for performance by a smaller number of employees (e.g., agencies should not except, from furlough, multiple employees in order to perform intermittent “excepted” work, when instead the agency could have fewer employees perform the “excepted” work on more of a full-time basis). In this way, the agency properly minimizes its reliance on the Anti-deficiency Act to incur obligations for which the appropriation has lapsed.

A: Information Technology

Q1: What is the controlling consideration for the continuity or suspension of IT operations for an agency during a lapse in appropriations?

A1: The consideration governing all determinations concerning continuity or suspension of Federal activities funded through lapsed appropriations is that such activities, including IT operations, may continue only if they are excepted activities under the Anti-deficiency Act, or where their continuation is necessarily implied from a congressional authorization or appropriation of other continued functions.

Q2: How should agencies determine what systems, including linked interoperable systems, are to be maintained and operated during an appropriations lapse?

A2: If a single system must operate to avoid significant damage to the execution of authorized or excepted activities, only this system should maintain operations, and support for continued operation of the single system (whether by agency IT staff or by a contractor) should be the minimum necessary to maintain functionality and ensure the security and integrity of the system during the period of the lapse. If the integration of that system with other systems makes it infeasible to maintain operation of the single system without maintaining others with which it is integrated, an agency must provide guidance on operations consistent with avoiding any imminent threat to Federal property (including avoiding any permanent disruption to agency IT systems and ensuring preservation of agency electronic records). Given that websites represent the front-end of numerous back-end processing systems, agencies must determine whether the entire website can be shut down or components of the website will be shut down.

Q3: What is the guidance on keeping Government websites up during a lapse in appropriations if the costs of maintaining the website are funded by a lapsed appropriations source?

A3: The same standards described above would apply. The mere benefit of continued access by the public to information about the agency's activities would not warrant the retention of personnel or the obligation of funds to maintain (or update) the agency's website during such a lapse. However, if maintenance of the website is necessary to avoid significant damage to the execution of authorized or excepted activities (e.g., maintenance of the IRS website may be necessary to allow for tax filings and tax collection, which are activities that continue during an appropriations lapse), then the website should remain operational even if its costs are funded through appropriations that have lapsed. If it becomes necessary to incur obligations to ensure that a website remains available in support of excepted activities, it should be maintained at the lowest possible level. For example, in the IRS case above, the IRS website would remain active, but the entire Treasury Department website would not, absent a separate justification or a determination that the two sites cannot not feasibly be operated separately.

Q4: What notice should agencies provide to the public regarding the status of their websites during a lapse of appropriations?

A4: If an agency's website is shut down, users should be directed to a standard notice that the website is unavailable during the period of government shutdown. If any part of an agency's website is available, agencies should include a standard notice on their landing pages that notifies the public of the following: (a) information on the website may not be up to date, (b) transactions submitted via the website might not be processed until appropriations are enacted, and (c) the agency may not be able to respond to inquiries until appropriations are enacted.

Q5: What if the cost of shutting down a website exceeds the cost of maintaining services?

A5: The determination of which services continue during an appropriations lapse is not affected by whether the costs of shutdown exceed the costs of maintaining services.

Q6: If websites are down, will agencies be able to extend deadlines for applications that would otherwise have been due during the lapse in appropriations?

A6: To the extent permitted by law, agencies may extend deadlines for activities, as necessary to compensate for the period of the lapse in appropriations and the unavailability of the website.

Q7: What is the guidance regarding the use of mobile devices such as Blackberries, or home access to work email through Secure ID?

A7: Furloughed employees should be given clear guidance that the prohibitions of the Anti-deficiency Act extend to work performed from outside of the office, including via mobile devices or remote computer connections. Orderly shutdown procedures should not rely on mobile devices or home access to work email for providing notices of when to return to work. Agencies have discretion to enforce these access restrictions in light of their own particular needs. Some may choose, for example, to include in orderly shutdown activities a requirement that furloughed employees turn in their Blackberries until they return to the office; others may determine that circumstances warrant a different approach.

B. Orderly Shutdown

Q8: How long should “orderly shutdown” take?

A8: Ordinarily, furloughed employees should take no more than three or four hours to provide necessary notices and contact information, secure their files, complete time and attendance records, and otherwise make preparations to preserve their work. OMB Circular A-11 requires agencies to provide OMB with written justification for the conduct of orderly shutdown activities in excess of a half-day. While it may be appropriate in limited circumstances for some employees to take longer to assist in shutdown activities (e.g., seeking court continuances or stop-work orders on pending contracts), these may not be necessary in the event that a very short period of a lapse in appropriations is anticipated. Agencies should make every effort to prepare for these needs in advance of a lapse so that orderly shutdown activities are minimized.

Q9: In the event of a lapse on a Friday, when would employees whose schedule is a normal Monday-Friday work week and who are funded by annual appropriations be expected to conduct orderly shutdown activities?

A9: They should be directed to return to work on the following Monday morning to conduct such activities.

Q10: Does this mean that they can continue to work remotely over the preceding weekend?

A10: No. Following a lapse in appropriations, the Anti-deficiency Act bars non-excepted work by such employees other than to perform orderly shutdown activities.

C. Travel

Q11: If employees funded through appropriations that have lapsed are on temporary duty assignments away from their normal duty stations at the time of an appropriations lapse, can they make arrangements to return home sooner than planned?

A11: They are encouraged to do so wherever reasonable and practicable. However, agencies should make a determination of reasonableness and practicality based on the length of the assignment and the time required for return travel, compared to the anticipated length of the lapse, so as to minimize the burdens of doing so.

D. Entitlement to Payment for Excepted Work

Q12: How will excepted employees be paid for excepted work required during the lapse in appropriations?

A12: Without further specific direction or enactment by Congress, all excepted employees are entitled to receive payment for obligations incurred by their agencies for their performance of excepted work during the period of the appropriations lapse. After appropriations are enacted, payroll centers will pay all excepted employees for time worked.

Attachment 1

Determining Whether to Continue Performance of an Existing Contract/Grant/Cooperative Agreement (CA)

